No. 1071

In the Supreme Court of the United States

OCTOBER TERM, 1956

SUNRISE LUMBER & TRIM CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (Pet. App. B) is reported at 241 F. 2d 620. The findings of fact, conclusions of law, and order of the Board (R. 158-196) are reported at 115 NLRB 866.

JURISDICTION

The judgment of the court below (Pet. App. A) was entered on March 11, 1957. The petition for certiorari was filed on June 10, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254. See also Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Whether Section 9(c) of the Act, which deals with the procedure by which labor organizations may secure formal Board certifications, precludes the Board from determining, in an unfair labor practice proceeding under Section 10, questions relating to the determination of the appropriate unit and to representation, where such issues are relevant to the charges of refusal to bargain.[1]

2. Whether in the circumstances of this case the Board properly found that petitioner's refusal to bargain with the Union and to reinstate strikers who struck in protest of such refusal constituted violations of the Act, even assuming that the Union in its initial request for a collective bargaining agreement demanded an unlawful union security provision.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151 *et seq.*), are set forth in the petition for certiorari, pp. 3-5.

STATEMENT

A. *The Board's findings of fact.* Briefly, the Board found that petitioner, in violation of Section 8(a) (1), (3) and (5) of the Act, restrained and coerced

[1] Although the court below dealt with this issue, it is doubtful whether petitioner, who did not urge this objection before the Board, can rely upon it at this stage. See *National Labor Relations Board* v. *Cheney Lumber Co.*, 327 U.S. 385, 387-389.

its employees in the exercise of their rights under the Act; denied reinstatement to four strikers who applied therefor; and refused to recognize and bargain with the majority representative of its employees in a unit appropriate for collective bargaining purposes. The subsidiary facts upon which the Board based its findings may be summarized as follows:

On March 18 and 19, 1955, five of petitioner's nine truck drivers and yardmen signed cards authorizing Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (hereinafter called the Union) to make an agreement with petitioner requiring membership in the Union as a condition of employment (R. 161; 8-10, 19-23, 55). Also, on March 19, Cody, the Union's business agent, told Tursi, petitioner's president, that he represented petitioner's employees and wanted to organize the plant (R. 161; 25, 28). Cody produced a printed form contract which he offered to Tursi, saying that it "was what we [the Union] were asking for" (R. 161; 25, 38-39). The contract, in addition to dealing with wages, hours of employment, seniority, etc., contained a union security clause providing, in Sec. 8(a) thereof, that 'Members of the * * * [Union are] to be employed when available, otherwise those who will become members of [the Union] at its next meeting" (R. 178-179; 15, 39, Resp. Exh. 2).[2]

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[2] Section 8 of the contract also contained a "saving clause," reading as follows:

If Section 8(a) of this contract is in conflict with the

Company President Tursi refused to take the Union's form contract and told Cody to give it to his (Tursi's) lawyer whom, however, he did not identify. Tursi also stated that it "was against his religion to be unionized" and ordered Cody to "get * * * off of my property and stay off" (R. 161-162; 25-27).

On March 23, another employee in the unit signed an authorization card and on the following day, the Union filed with the Board a petition seeking certification as the bargaining representative of petitioner's "Chauffeurs and Yardman" (R. 162; 11, 24, 148).

The following day, March 25, Union Business Agent Cody met with the six Union employees and it was agreed that the men would strike, if necessary, to obtain recognition of the Union (R. 162; 31-32). Later, when Cody informed Tursi of this decision, Tursi decided to meet and talk with the employees (R. 162; 32, 86, 99).

In his talk to the employees, Tursi stated that he was opposed to the unionization of the mill and again

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Labor Management Relations Act it is understood and agreed that such provision shall not be operative so long as such conflict exists but shall become operative immediately upon repeal of said Law or upon said Law being determined to be unconstitutional or inapplicable. If Section 8(a) is not operative for the foregoing reason then throughout the term of this agreement all employees shall be required, as a condition of employment, to become members of the Union on or after thirty (30) days following the beginning of employment or the effective date of this agreement whichever is the later. This requirement is subject to receipt of the necessary certification from the National Labor Relations Board.

said that it was "against his religion" to operate a unionized plant (R. 163; 60, 86, 100-103). He discussed with the employees their grievances regarding wages and hours and then offered them concessions conditioned on their disavowal of the Union (R. 163; 58-60, 87-88, 160). The men rejected this condition, stating that they wanted a union and that if necessary they would "go on strike" to obtain union recognition (R. 163; 60, 80-89, 101-102).

The same day, March 25, the employees picketed the plant (R. 163; 33, 89). Company President Tursi and Foreman Ruiz told the pickets they "were damned fools for not taking up Mr. Tursi's offers," and Tursi "kept repeating that it was against his religion, and he'd sell his trucks and rent trucks before he'd let the union in" (R. 164; 90). The employees replied that they "were going to stay there until [they] were recognized" (R. 164; 98). About a week later, Tursi offered two of the pickets $25 each if they would unload a freight car but both refused (R. 164; 62). Tursi also told one of the strikers that he would make arrangements for him to install fences sold by the Company if he would buy a small truck necessary for the job (R. 164; 67).

On May 24, the Union filed its initial charge of unfair labor practices in this proceeding (R. 164). On June 10, the Union requested petitioner to reinstate five employees, four of whom had been on strike until that date (R. 165, 11-12, 141).[3] Also on

[3] The fifth employee had abandoned the strike before the reinstatement request and already had been reinstated (R. 161; 155-156).

une 10, the Union, with the Regional Director's approval, withdrew its petition for representation (R. 64; 243).

B. *The Board's decision and order.* Upon the foregoing facts the Board found, in agreement with the trial examiner, that petitioner violated Section 8 (a) (5) and (1) of the Act by refusing to recognize and bargain with the Union, and by offering improved working conditions directly to the employees conditioned on their rejecting the Union (R. 176-177, 190). Contrary to petitioner's contention, the Board found that petitioner's nine truck drivers and yardmen constituted an appropriate unit for collective bargaining and that the Union had been designated by a majority of these employees as the bargaining representative (R. 165-175). The Board also rejected petitioner's contention that its refusal to bargain was justified because the form contract offered by Union Representative Cody to Company President Tursi on March 19 allegedly contained an illegal union security clause, stating (R. 179):

> * * * the issues herein [do not] require a determination of the alleged invalidity of the [union security] provision. If it be assumed *arguendo* that the provision contravenes the Act, its existence in the proposed contract did not relieve the [Company] of the obligation to recognize the Union and to bargain collectively. *N.L.R.B.* v. *White Construction Co.*, 204 F. 2d 950 (C.A. 5). Moreover, the provision was not mentioned in Tursi's conversations with Cody or the employees, insofar as the record discloses, and the purpose of the strike was not to force

the Company to agree to the provision. The purpose instead, as the reliable evidence fully establishes, was to overcome the Company's opposition to the principle of collective bargaining.

The Board further found that petitioner violated Section 8(a)(1) of the Act by threatening to abolish the strikers' jobs rather than recognize the Union and by soliciting the employees to return to work (R. 177-178). Finally, the Board found that because the employees struck in protest against petitioner's unlawful refusal to bargain with the Union petitioner's failure to offer four of them reinstatement upon their application violated Section 8(a)(3) and (1) of the Act (R. 178-181).

The Board's order (R. 191-194) requires petitioner to cease and desist from the unfair labor practices found; to bargain with the Union upon request; and to offer reinstatement to those strikers not already reinstated and make them whole for any loss of pay they may have suffered as a result of the discrimination against them.

C. *The decision of the court below.* The court below affirmed the Board's findings and enforced the order in full. Rejecting petitioner's contention, raised for the first time in the enforcement proceeding (see *supra*, p. 2, n. 1), that the Board was not empowered to determine the appropriate unit or the Union's right to represent the unit in the unfair labor practice proceeding because the Board had previously approved the withdrawal by the Union

of its petition for a representation election, the court below stated (Pet. App. B, 6-7):

> This position is wholly untenable, however, because it is the duty of an employer to bargain with the majority representative of its employes whether or not that representative has been certified. * * *. This rule applies even where, as here, the majority representative has filed a representation petition, that it subsequently withdraws after the employer's refusal to bargain. * * * And, of necessity, the Board must frequently determine the appropriateness of an alleged bargaining unit in order to pass upon a charge that an employer has refused to bargain with the majority representative of that unit.

The court below also rejected petitioner's contention that its refusal to bargain was justified on the alleged ground that the Union demanded an illegal closed shop clause in the proposed contract offered by Union Representative Cody to Company President Tursi at their initial meeting on March 19, 1955. The court below stated (Pet. App. B, 7-8):

> Assuming, *arguendo*, that the union was, in fact, demanding an illegal security clause, we hold that such a demand is a matter to be resolved in the bargaining process, not an excuse for refusing to bargain at all. * * * [T]here is substantial evidence in the record to support the Board's finding that Tursi's refusal to bargain with the union representative was motivated by his strong objection to unions and not by the particular terms of the printed form contract.

ARGUMENT

1. Petitioner's contention (Pet. 8-12) that the Board was without power to determine in the unfair labor practice proceeding the appropriate unit and the Union's majority status presents no question warranting review by this Court. It is well settled that normally "the right of employees to bargain collectively through an exclusive bargaining representative is not conditioned upon an antecedent certification by the Board where, as here, the majority status of the union is clearly established otherwise." *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 14 (C.A. 1). See also *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72; *National Labor Relations Board* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 209 (C.A. 9). It is clear, therefore, as the court below held (Pet. App. B. 7), that "of necessity, the Board must frequently determine the appropriateness of an alleged bargaining unit in order to pass upon a charge [filed in a Section 10 proceeding] that an employer has refused to bargain with the majority representative of that unit." Accordingly, the courts of appeals have, after the Taft-Hartley Act as before, uniformly upheld Board determinations of relevant representation questions in unfair labor practice proceedings, even though no petition for certification was ever filed by the union or, if filed, was later withdrawn by the union. See, *National Labor Relations Board* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769, 771 (C.A. 1); *National Labor Relations Board* v. *Epstein*, 203 F. 2d 482, 483-484 (C.A. 3), certiorari denied, 347 U.S. 912; *National*

abor Relations Board v. *Armco Drainage & Metal Products, Inc.*, 220 F. 2d 573, 576-577 (C.A. 6), ertiorari denied, 350 U.S. 838; *National Labor Relations Board* v. *Hunter Engineering Co.*, 215 F. 2d 16, 920-923 (C.A. 8); *Motorola, Inc.* v. *National Labor Relations Board*, 199 F. 2d 82, 83 (C.A. 9), ertiorari denied, 344 U.S. 913; *National Labor Relations Board* v. *Trimfit of California, Inc.*, 211 F. d 206, 209 (C.A. 9).

Petitioner's reliance (Pet. 8) on the changes in he language of Section 9(c), made by the Taft-Hartley Act, in support of the claim that the Board's power to make unit and representation determinations "is strictly limited to a proceeding under Section 9," is misplaced. Section 9 (c) deals only with he procedure by which unions may secure formal ertification from the Board. Nothing in the statute r its legislative history suggests that the amendment was intended to preclude the Board from determining representation questions without formal ertification when relevant in unfair labor practice roceedings.

Equally misplaced is petitioner's reliance on Section 9(d) of the amended Act, which provides that [w]henever an order of the Board made pursuant to ection 10(c) is based in whole or in part upon acts certified following an investigation" in a representation proceeding, "such certification and the record of such investigation shall be included in the ranscript of the entire record filed in the court here the order is sought to be enforced. The Act oes not permit direct review of Section 9 representa-

tion proceedings by the courts of appeals as it does of unfair labor practice orders issued under Section 10 of the Act. *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401. The sole purpose of Section 9(d) is to afford a review of a Board determination in representation proceedings and the underlying record when it is the basis for an unfair labor practice order under Section 10 of the Act.

2. Petitioner's Question No. 2, putting in issue the power of the Board to "direct an employer to bargain with a union and to offer reinstatement with back pay to employees who went on strike to secure the union's demand for a contract containing an unlawful union security" (Pet. 2, 14), is predicated on the erroneous premise that petitioner's refusal to bargain was in fact motivated by the alleged illegal demand and that the strikers' walkout was primarily called to enforce such demand. Rejecting this premise, the Board found that the allegedly illegal clause was not even "mentioned" by petitioner in its dealings with the Union and, further, that the purpose of the strike "was not to force [petitioner] to agree to the provision" but, rather, "to overcome [petitioner's] opposition to the principle of collective bargaining" (*supra*, pp. 6-7). This finding, as the court below held, is amply supported by the record.

Moreover, as the court below held (Pet. App. B, 7-8), "Assuming, *arguendo*, that the union was, in fact, demanding an illegal security clause * * * such a demand is a matter to be resolved in the bargaining process, not an excuse for refusing to bargain at all." Accord: *National Labor Relations*

Board v. *White Construction and Engineering Co., Inc.*, 204 F. 2d 950, 953 (C.A. 5). The cases relied on by petitioner (Pet. 13) are not in conflict with the ruling below. In those cases the unions adamantly insisted (by threats of strikes or otherwise) on the employer's acceptance of the illegal union security provisions as a condition for concluding a contract.

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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